

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2095

Cir. Ct. No. 2011CV2746

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ATTIC ANGEL PRAIRIE POINT, INC.,

PLAINTIFF-RESPONDENT,

V.

CITY OF MADISON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
PETER ANDERSON, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 HIGGINBOTHAM, J. Attic Angel Prairie Point, Inc. (AAPP)¹ seeks exemption from general property taxes pursuant to WIS. STAT. § 70.11(4d) (2013-14).² AAPP paid property taxes to the City of Madison for the 2010-11 tax year and then later sought return of those taxes on the ground that AAPP met the conditions for exemption under § 70.11(4d). The City refused to refund the property taxes and AAPP brought suit against the City. On cross-motions for summary judgment, the circuit court granted judgment to AAPP primarily on the ground that AAPP is a benevolent association as that phrase is used in § 70.11(4d).

¶2 The City makes three arguments on appeal: (1) issue preclusion applies because the question whether AAPP is a benevolent association under WIS. STAT. § 70.11(4) (2002-03) was previously litigated, and AAPP did not appeal the ruling; (2) a so-called “benevolence test” applies to determine whether AAPP qualifies for exemption from property taxes under WIS. STAT. § 70.11(4d), and AAPP does not satisfy that test; and (3) the circuit court erred in denying the City’s motion for summary judgment based on the City’s contention that AAPP is not a benevolent association.³

¹ For clarity, we refer to Attic Angel Prairie Point Inc. as “AAPP.” This is not to be confused with other entities related to AAPP, namely, Attic Angel Association (the sole member of the AAPP corporation), or Attic Angel Place Inc. (a licensed skilled nursing facility). AAPP is part of a “continuum of care” with Attic Angel Place, but it is a separate corporation.

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

³ The City raises two additional arguments that we reject without any analysis. First, the City argues that the circuit court erred when it relied on facts and opinions regarding the nature of AAPP based on the judge’s conversations with his next-door neighbor regarding the neighbor’s experience at AAPP, which the City asserts were facts outside of the record. Assuming the City’s assertion to be true, this is of no consequence. Our review on appeal is de novo and whether the court improperly considered facts outside of the record in reaching its decision is irrelevant to our decision making. We do not have those facts before us and our review is limited to the record submitted to this court.

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¶3 For the reasons we explain below, we conclude the following: (1) issue preclusion does not apply in this case; (2) the City’s arguments regarding the so-called “benevolence test” are misplaced; and (3) the City fails to persuade us by reference to pertinent legal authority and applying that law to the undisputed facts that the City, and not AAPP, is entitled to summary judgment. Therefore, we affirm.

BACKGROUND

¶4 The facts are taken from the summary judgment record and are undisputed. AAPP is a charitable nonprofit organization and a Wisconsin nonstock corporation duly organized and existing under the laws of the State of Wisconsin. In 2000, AAPP acquired property in the City of Madison to develop, construct, and operate a retirement community for the aged, known as Prairie Point.⁴ The Prairie Point property “is designed to meet the community’s need for elderly housing and services as part of a continuum of care.” AAPP’s Articles of Incorporation state that one of AAPP’s purposes is “[t]o develop and operate senior housing and to provide necessary services to allow individuals 55 years old and older to live independently.”

Second, the City argues that the circuit court erred by not considering the entire record in reaching its decision. Specifically, the City argues that the court did not consider evidence offered by the City as to the financial information of the AAPP residents. We decline to consider this argument because the City has failed to present a developed argument on this topic. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we do not address issues not fully developed).

⁴ We note that “Prairie Point” is the name of the retirement home property, not to be confused with the full name of the party in this case, Attic Angel Prairie Point, Inc., which as stated above, we refer to as “AAPP.”

¶5 In 2010, the Prairie Point property contained 108 residential independent living units. The units are constructed with several amenities to improve the quality of life for the property's residents. AAPP collects upfront residency fees from the initial residents of each residential unit to assist repayment on construction loans and development costs. AAPP and residents also enter into a Residency and Services Agreement, which requires all residents be at least fifty-five years old and requires the resident to make a one-time residency fee payment to AAPP due at signing as a right to occupy the unit. Residents then pay monthly service fees and when the Residency and Services Agreement is terminated, the resident receives a return of 80% to 100% of the one-time residency fee payment.

¶6 Since the development of the Prairie Point property, AAPP has not made a profit from its operations. Attic Angel Association provides financial assistance to AAPP, and audited financial statements from 2010 show that AAPP owed Attic Angel Association \$2,231,414.

¶7 In 2010, the City levied property taxes on the Prairie Point property in the amount of \$681,427.02. AAPP paid the full amount. In 2011, AAPP filed a claim against the City for recovery of unlawful taxes claiming exemption under the newly adopted WIS. STAT. § 70.11(4d) as a "Benevolent Retirement Home for the Aged."

¶8 The City and AAPP both filed motions for summary judgment. In the arguments supporting the motions, the parties disputed just one requirement under WIS. STAT. § 70.11(4d), namely, whether AAPP is a "benevolent association."

¶9 Following a hearing on the motions, the circuit court granted summary judgment in favor of AAPP on the ground that AAPP is a benevolent

association and, therefore, the property is exempt under WIS. STAT. § 70.11(4d). The City appeals.

STANDARD OF REVIEW

¶10 When both parties move by cross-motions for summary judgment, it is “the equivalent of a stipulation of facts permitting the [circuit] court to decide the case on the legal issues.” *Streiff v. American Family Mut. Ins. Co.*, 114 Wis. 2d 63, 64-65, 337 N.W.2d 186 (Ct. App. 1983), *rev’d on other grounds*, 118 Wis. 2d 602, 348 N.W.2d 505 (1984). In reviewing a circuit court order granting summary judgment, we employ the same methodology used by the circuit court. *Fireman’s Fund Ins. Co. v. Bradley Corp.*, 2003 WI 33, ¶15, 261 Wis. 2d 4, 660 N.W.2d 666. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶11 This case requires us to interpret and apply WIS. STAT. § 70.11(4d). “Issues of statutory interpretation are subject to de novo review.” *Beaver Dam Cmty. Hosps., Inc. v. City of Beaver Dam*, 2012 WI App 102, ¶7, 344 Wis. 2d 278, 822 N.W.2d 491. In interpreting statutes, the court’s purpose is to determine what the legislature intended in drafting the statute. *State v. Setagord*, 211 Wis. 2d 397, 406, 565 N.W.2d 506 (1997). In making this determination, the court assumes that the statutory language expresses the legislature’s intent. *Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language “in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely[]related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.*, ¶46. “[S]tatutory ‘interpretation begins with the language of the statute. If the

meaning of the statute is plain, we ordinarily stop the inquiry.” *Id.*, ¶45 (citation omitted). “Although plain meaning analysis primarily focuses on the words and phrases in disputed portions of statutes, courts also consider the context represented by the entire statute. Statutory history, which involves comparison of the statute with its prior versions, is also a part of plain language analysis.” *Beaver Dam Cmty. Hosps., Inc.*, 344 Wis. 2d 278, ¶8 (citations omitted).

¶12 An exemption under a property tax statute is to be “strictly construed ... with a presumption that the property in question is taxable, and the burden of proof is on the person who claims the exemption.” WIS. STAT. § 70.109. We apply a “strict but reasonable construction” to tax exemption statutes. *Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 80, 591 N.W.2d 583, 583 (1999) (citation omitted). “The party claiming the exemption must show the property is clearly within the terms of the exception and any doubts are resolved in favor of taxability.” *Trustees of Ind. Univ. v. Town of Rhine*, 170 Wis. 2d 293, 299, 488 N.W.2d 128 (Ct. App. 1992); *see also Deutsches Land, Inc.*, 225 Wis. 2d at 80-81.

DISCUSSION

¶13 The dispute in this case centers on the legislature’s enactment of 2009 Wis. Act 28, which created a separate category of property that is subject to exemption from general property taxes, “Benevolent Retirement Homes for the Aged” in WIS. STAT. § 70.11(4d).⁵ Under the express language of subsection (4d),

⁵ WISCONSIN STAT. § 70.11(4d) states in full:

(4d) BENEVOLENT RETIREMENT HOMES FOR THE AGED.
Property that is owned by a nonprofit entity that is a benevolent association and used as a retirement home for the aged, but not

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property is exempt from general property taxes if it meets the following requirements:

1. the property “is owned by” an “entity”
2. the owning entity is “a nonprofit entity”
3. the owning entity “is a benevolent association”
4. the property is “used as a retirement home for the aged”
5. the property does “not exceed[] 30 acres of land necessary for the location and convenience of buildings”
6. the “property is not used for profit”

exceeding 30 acres of land necessary for the location and convenience of buildings, while such property is not used for profit, if the fair market value of the individual dwelling unit, as determined by the assessor for the taxation district in which the property is located, is less than 130 percent of the average equalized value under s. 70.57 of improved parcels of residential property located in the county in which the retirement home for the aged is located in the previous year, as determined by the assessor of the taxation district in which the property is located based on the sum of the average per parcel equalized value of residential land and the average per parcel equalized value of residential improvements, as determined by the department of revenue. For purposes of determining the fair market value of an individual dwelling unit under this subsection, the value of any common area is excluded. The common area of a retirement home for the aged is exempt from general property taxes if 50 percent or more of the home’s individual dwelling units are exempt from general property taxes under this subsection. If less than 50 percent of the home’s individual dwelling units are exempt from general property taxes under this subsection, the common area of the retirement home for the aged is subject to general property taxes. Leasing a part of property used as a retirement home for the aged, as described in this subsection, does not render it taxable, regardless of how the leasehold income is used.

7. “the fair market value of the individual dwelling unit ... is less than 130 percent of the average equalized value under s. 70.57 of improved parcels of residential property located in the county in which the retirement home for the aged is located in the previous year.”

As noted above, the parties dispute only the third requirement, whether AAPP is a “benevolent association.”

1. Issue Preclusion

¶14 The City argues that issue preclusion applies to bar this litigation because, it asserts, the issue of whether AAPP is a benevolent association was previously litigated and decided against AAPP in the circuit court for the 2002-03 tax years, and AAPP did not appeal that decision.⁶ However, the circuit court did not address the requirement whether AAPP was a benevolent association in that case. Rather, the court focused on a different requirement that existed under the statute then in effect, namely, whether the record demonstrated that AAPP used its Prairie Point property exclusively for benevolent purposes. The City fails to point to any part of that decision in which the court addressed or decided the specific question as to whether AAPP was a benevolent association. Thus, the City fails to show that the only disputed issue here, whether AAPP is a benevolent association, was actually litigated in the earlier case. *See Mrozek v. Intra Fin. Corp.*, 200 WI 73, ¶17, 281 Wis. 2d 448, 699 N.W.2d 54 (“In order for issue preclusion to be a potential limit on subsequent litigation, the question of fact or law that is sought to be precluded actually must have been litigated in a previous action”).

⁶ *See Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶17, 281 Wis. 2d 448, 699 N.W.2d 54 (“Issue preclusion addresses the effect of a prior judgment on the ability to re-litigate an identical issue of law or fact in a subsequent action.”).

Accordingly, we reject the City's argument that issue preclusion applies to bar the litigation here.

2. The So-Called "Benevolence Test"

¶15 As we understand this argument, the City argues that case law imposes what the City calls the "benevolence test." The City seems to say that this "benevolence test," set forth in cases such as *Deutsches Land, Inc.* and *Milwaukee Protestant Home for the Aged v. City of Milwaukee*, 41 Wis. 2d 284, 164 N.W.2d 289 (1969), is a test that was required to be met "under the previous law," an apparent reference to previous versions of WIS. STAT. § 70.11 (2007-08), and that subsequent changes in the statute did not eliminate the "benevolence test." The City's assertion seems to be that, in addition to satisfying the seven requirements of current § 70.11(4d), AAPP must also satisfy the "benevolence test." If this is what the City means to argue, its argument is easily rejected.

¶16 Neither *Deutsches Land, Inc.* nor *Milwaukee Protestant Home for the Aged* purports to set forth something called the "benevolence test." Rather, in the portions of the decisions cited by the City, each decision states the then existing statutory requirements under WIS. STAT. § 70.11 (1967-68) and WIS. STAT. § 70.11 (1995-96). *Deutsches Land, Inc.* states:

[U]nder Wis. Stat. § 70.11(4), an organization must show three facts: (1) that it is a benevolent organization, (2) that it owns and exclusively uses the property, and (3) that it uses the property for exempt purposes.

Deutsches Land, Inc., 225 Wis. 2d at 81-82. And, *Milwaukee Protestant Home for the Aged* states:

In order for a retirement home for the aged or a nursing home or a hospital to qualify for exempt status under sec. 70.11, Stats. ". . . it must appear that,

(1) appellant is a benevolent association; (2) the personal property is used exclusively for the purposes of such association; (3) the real and personal property is not used for pecuniary profit.”

Milwaukee Protestant Home for the Aged, 41 Wis. 2d at 293 (quoting another source). Thus, the more apt description of the “tests” in *Deutsches Land* and *Milwaukee Protestant Home for the Aged* is that they are the *statutory tests* setting out the requirements under the then existing statutes. The fact that the tests remained substantially the same is a function of the similarity of the former versions of the statutory language, not because there is some sort of separate ongoing “benevolence test.”

¶17 It is undisputed that, in the current WIS. STAT. § 70.11(4d), the legislature has provided the language that governs the tax-exempt status of retirement homes for the aged during the time period pertinent here. The question before us is the meaning and application of the language in § 70.11(4d). There is no additional stand-alone or carry-over “benevolence test.”⁷

¶18 Having concluded that there is no stand-alone “benevolence test” that adds something to the applicable statute here, we turn to the City’s argument that AAPP is not a benevolent association.

⁷ Because we reject the City’s assertion that there is a “benevolence test” apart from the requirements imposed by the statutes in effect at the time pertinent to this appeal, we also, obviously, reject the City’s arguments based on its application of that so called test. Still, although mislabeled, we discern that part of the City’s “benevolence test” argument as its contention that AAPP does not meet the “benevolent association” requirement. We address that issue next in the text. On the other hand, to the extent the City contends that AAPP has failed to show that it actually uses its property for a benevolent purpose or that it is engaged in benevolent activities, we note that these are not requirements in the applicable statute and we decline to address them.

3. Whether AAPP is a Benevolent Association

¶19 As far as we can tell, having rejected the City’s argument that there is a stand-alone “benevolence test,” all that remains is the part of the City’s discussion on that topic asserting that the undisputed facts show that AAPP is not a “benevolent association,” a requirement under WIS. STAT. § 70.11(4d). (*See supra* ¶13.) However, the City asks us to examine the undisputed facts through the lens of decisions that, as far as we can tell, do not analyze the “benevolent association” requirement. Rather, all of the case law on which the City relies expressly or implicitly assumes as undisputed that the entity seeking exemption is a benevolent association. The cases then proceed to interpret and apply other statutory requirements. *See, e.g., Milwaukee Protestant Home for the Aged*, 41 Wis. 2d at 292-294, 295 (“[n]o claim is made that the Milwaukee Protestant Home for the Aged is not a benevolent association” and proceeding to address whether the Protestant Home was being operated “for pecuniary profit” under the 1967 version of the statute then in effect). The City does not come to grips with the failure of these cases to address, separately and expressly, the “benevolent association” requirement. We can identify nothing in the City’s argument explaining how the discussions of other requirements apply here or why such discussions might show that the City is entitled to summary judgment.⁸

⁸ The City appears to argue that AAPP is not a benevolent association because AAPP’s retirement homes are for people of affluence and not affordable for people of moderate means. It appears that the City is referring to the financial status of the residents and is arguing that the residents of AAPP are more affluent than those the supreme court had in mind in *Milwaukee Protestant Home for the Aged* when it declared that helping “retired persons of moderate means live out their remaining years is ‘benevolent.’” *Milwaukee Protestant Home for the Aged v. City of Milwaukee*, 41 Wis. 2d 284, 300, 164 N.W.2d 289 (1969). If this is the argument the City intends to make, it is undeveloped. That is, if the City means to persuade us that one requirement under WIS. STAT. § 70.11(4d) to be a “benevolent association” is that the entity must serve only

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¶20 Because the City fails to persuade us that it, and not AAPP, is entitled to summary judgment, the City fails to persuade us that the circuit court erred in granting summary judgment to AAPP and not to the City.

CONCLUSION

¶21 For the reasons stated above, we affirm the circuit court's decision granting AAPP's motion for summary judgment and denying the City's motion for summary judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

people of “moderate means,” the City provides no legal analysis or supporting explanation. We decline to address this argument.

